

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ELIZABETH HATCHER,

Plaintiff,

V.

MICHAEL J. ASTRUE, Commissioner of
Social Security Administration,

Defendant.

CASE NO. C07-5019RBL

REPORT AND RECOMMENDATION

Noted for September 7, 2007

This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. §

636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed, and after reviewing the record, the undersigned recommends that the Court affirm the administration's final decision.

INTRODUCTION

Plaintiff, Elizabeth Hatcher, was born in 1957, completed the 11th grade and earned a GED. Ms. Hatcher stopped working in September, 2001 while employed in a warehouse at a plastic molding company. Prior to that, she worked as a waitress. She quit waitressing due to difficulties performing the required lifting, standing and bending. Plaintiff was experiencing pain in her head, neck, right arm and lower back.

On October 30, 2001, Plaintiff filed an application for social security disability insurance benefits (“DIB”) (Tr. 84-86). She alleged disability since August 14, 2001 due to nerve and muscle damage to the

1 right arm, right neck and right hip (Tr. 84, 100). After the application was denied initially and upon
 2 reconsideration, plaintiff requested an ALJ hearing.

3 On December 3, 2002 an administrative law judge (“ALJ”) conducted an administrative hearing
 4 and subsequently, the ALJ issued an unfavorable decision on January 13, 2003 (Tr. 11-20, 319-352).
 5 After the Appeals Council declined review, plaintiff filed a complaint in this Court (Tr. 11-13). Pursuant
 6 to a stipulation of the parties the matter was remanded to the administration to reassess lay witness
 7 testimony, new issues raised, plaintiff’s residual functional capacity (“RFC”) and past relevant work as
 8 well as obtain testimony from a vocational expert (“VE”) (Tr. 387).

9 A second administrative hearing was conducted on September 22, 2005 by a different ALJ (Tr.
 10 447-507). After reviewing the evidence, including testimony from the VE, Plaintiff’s application for
 11 disability benefits was again denied (Tr. 373-383). The ALJ specifically concluded that Plaintiff retained
 12 the ability to work as a small products assembler, solderer, or video rental clerk (Tr. 383). After the
 13 Appeals Council declined review, the ALJ’s findings and conclusions became the final administrative
 14 decision for review by the court.

15 On January 14, 2007, Plaintiff filed her Complaint with the Court seeking judicial review of the
 16 administrative decision. Plaintiff raises the following issues:

17 1. Did the ALJ err by ignoring opinions from multiple physicians?
 18 2. Did the ALJ err by failing to order a consultative exam and additional medical testing to assess
 19 the limitations from plaintiff’s “severe” brachial plexopathy?
 20 3. Did the ALJ err by rejecting Mr. Hatcher’s testimony?
 21 4. Did the ALJ err by rejecting plaintiff’s testimony?
 22 5. Did the ALJ err by formulating a RFC without following SSR 96-8p?
 23 6. Do the steps 4 and 5 findings violate the SS rulings and regulations?

24 DISCUSSION

25 This Court must uphold the determination that plaintiff is not disabled if the ALJ applied the
 26 proper legal standard and there is substantial evidence in the record as a whole to support the decision.
 27 Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is such relevant evidence
 28 as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S.

1 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less
 2 than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.
 3 Sullivan, 772 F. Supp. 522, 525 (E.D. Wash. 1991). If the evidence admits of more than one rational
 4 interpretation, the Court must uphold the Secretary's decision. Allen v. Heckler, 749 F.2d 577, 579 (9th
 5 Cir. 1984).

6 **A. THE ALJ PROPERLY DEVELOPED AND ASSESSED THE MEDICAL EVIDENCE**

7 The ALJ is entitled to resolve conflicts in the medical evidence. Sprague v. Bowen, 812 F.2d
 8 1226, 1230 (9th Cir. 1987). He may not, however, substitute his own opinion for that of qualified medical
 9 experts. Walden v. Schweiker, 672 F.2d 835, 839 (11th Cir. 1982). If a treating doctor's opinion is
 10 contradicted by another doctor, the Commissioner may not reject this opinion without providing "specific
 11 and legitimate reasons" supported by substantial evidence in the record for doing so. Murray v. Heckler,
 12 722 F.2d 499, 502 (9th Cir. 1983). "The opinion of a nonexamining physician cannot by itself constitute
 13 substantial evidence that justifies the rejection of the opinion of either an examining physician or a
 14 treating physician." Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1996). In Magallanes v. Bowen, 881
 15 F.2d 747, 751-55 (9th Cir. 1989), the Ninth Circuit upheld the ALJ's rejection of a treating physician's
 16 opinion because the ALJ relied not only on a nonexamining physician's testimony, but in addition, the
 17 ALJ relied on laboratory test results, contrary reports from examining physicians and on testimony from
 18 the claimant that conflicted with the treating physician's opinion.

19 Plaintiff argues the ALJ failed to properly assess the opinions of Dr. Hack, Dr. Ogisu, Dr. Strong,
 20 and Dr. Anderson. Each of these medical providers' opinions and the ALJ decision with respect to each
 21 is discussed below.

22 *A. Dr. Arthur G. Hack, Chiropractor.*

23 Plaintiff was treated for two years following a work related injury in 1987 by Dr. Hack, a
 24 chiropractor. In a report completed in 1992, Dr. Hack noted mild headaches, moderate to severe back
 25 pain, shoulder pain and spasms and numbness in her right arm and hand, as well as "pins and needles" in
 26 the right hand (Tr. 170). Plaintiff argues Dr. Hack's opinion supports only part-time sedentary level work
 27 "with little demand for bending and lifting and lifting limited to 10 pounds or less." Plaintiff argues the
 28 ALJ ignored Dr. Hack's opinion evidence and it does not support the ALJ's RFC, which indicates

1 Plaintiff is capable of light work with occasional reaching and no overhead reaching on the right.

2 The ALJ did not ignore Dr. Hack's treatment records as suggested by Plaintiff. The ALJ
 3 specifically discussed Plaintiff's injury in 1987 and stated she has experienced pain since that time (Tr.
 4 375, 377). The ALJ noted, "The record shows a history of chiropractic treatment in the 1980's and early
 5 1990's but none in recent years" (Tr. 378). The ALJ discussed Plaintiff's limitations, stating:

6 The claimant has alleged low back pain and hip pain but there is no evidence of limitations
 7 in standing or walking. She has been diagnosed with mild thoracic scoliosis but no other
 8 conditions. Her allegation of leg length discrepancy is not supported by the treatment
 9 record. The claimant's right upper extremity impairment results in limitations in lifting
 and reaching. However, these problems began in 1987 and she was able to work for many
 years despite this condition. There is no evidence that her problems with right-side
 weakness have worsened since she was last able to work.

10 (Tr. 380)

11 In sum, the 1992 assessment by Dr. Hack significantly predates Plaintiff's alleged onset date of
 12 August 14, 2001. The period under review by the administration is essentially August 14, 2001 through
 13 November 4, 2005, the date of the ALJ's decision. As noted by the ALJ, the fact that Plaintiff
 14 successfully worked for many years following Dr. Hack's report and opinion diminishes its relevance to
 15 Plaintiff's limitations during the relevant period, and the ALJ properly did not give any significant weight
 16 to Dr. Hack's opinion proffered in 1992.

17 *B. Dr. Tatsuro Ogisu, Neurologist*

18 Plaintiff argues Dr. Ogisu's opinion supports limitations in repetitive movement, sitting limited to
 19 30-60 minutes, standing 15 minutes, walking limited to 1 block and lifting 5-10 pound lifting limitations
 20 due to right brachial plexopathy versus musculocutaneous neuropathy, chronic right lumbar radiculopathy
 21 and mild thoracic scoliosis with worsening "moderate" pain (Tr. 193-195). Plaintiff again alleges that the
 22 ALJ improperly ignored this opinion.

23 A review of Dr. Ogisu's opinion report does not support Plaintiff's argument. Plaintiff overstates
 24 Dr. Ogisu's diagnoses and assessment of her limitations. Plaintiff's Opening Brief at 12-13. The ALJ
 25 relied upon the opinion of Dr. Ogisu when he accepted the diagnoses of right brachial plexopathy as a
 26 severe impairment (Tr. 375). Dr. Ogisu's statement of limitations was that Plaintiff's "general level of
 27 pain is moderate", "[s]he demonstrates effective coping behavior", and "[t]he patient's stated limitations
 28 are reflective of her impairments but probably are modestly overstated." Tr. 195. As discussed below, the

1 ALJ properly found Plaintiff's subjective reports not credible, which supports Dr. Ogisu's comment
 2 regarding Plaintiff's overstated limitations and further undermines Plaintiff's argument that Dr. Ogisu
 3 assessed more severe limitations than assigned by the ALJ. In sum, the ALJ accepted Dr. Ogisu's
 4 diagnoses and the ALJ's assessment of Plaintiff's RFC assessment is consistent with Dr. Ogisu's report.

5 *C. Dr. Marylou Strong and Dr. Bruce C. Anderson*

6 Under the title, "THE ALJ ERRED BY IGNORING THE LIMITED FUNCTIONAL ABILITIES
 7 IDENTIFIED BY CHIROPRACTOR HACK AND DRS. OGISU, STRONG AND ANDERSON AS
 8 WELL AS RELYING UPON OUTDATED REACHING LIMITATIONS BY THE NONEXAMINING
 9 DDS PHYSICIANS" Plaintiff argues:

10 Dr. Anderson found decreased range of motion of the right arm posteriorly, overhead and
 11 on rotation. (Tr. 434). Dr. Strong noted all motions were decreased and painful in right
 12 shoulder, increasing pain and instability with popping. Dr. Strong diagnosed a rotator cuff
 13 and bicepital strain with possible tear. (Tr. 430). Treatment notes from Kaiser also indicate
 pain upon rotation of neck (Tr. 259), neck muscle spasms with limited ROM and left
 shoulder pain (Tr. 425-6), gait limited by low back pain (Tr. 259), and limitation of left
 arm rotation (Tr. 430-2). None of these limitations were addressed by the ALJ.

14 Plaintiff's Opening Brief at 16. After reviewing the record and the ALJ's decision, the undersigned is not
 15 persuaded by Plaintiff's argument that the ALJ erroneously ignored the opinions of Dr. Strong or Dr.
 16 Anderson.

17 First, the opinions or reports of Dr. Strong and Dr. Anderson are in the record as part of Medical
 18 records from Kaiser Health Plan dated April 17, 2003 through May 9, 2005 (Tr. 426-466, also referred to
 19 as Exhibit 7F). The ALJ does not specifically mention Dr. Strong or Dr. Anderson by name in his
 20 decision, but he does make several references to Exhibit 7F, pages 5, 9, 13, 14, 16, 17, and 21, when he
 21 discussed the medical evidence. Each of those references, with exception to pages 9 and 21, pertain to
 22 reports or notes of either Dr. Strong or Dr. Anderson. Clearly, the ALJ did not ignore these medical
 23 records.

24 Moreover, the medical records of Dr. Strong and Dr. Anderson do not support the severity of
 25 limitations alleged or argued by Plaintiff. Specifically, on August 27, 2003, Dr. Anderson opined
 26 Plaintiff had "[n]early full ROM of the shoulder" (Tr. 433, Exhibit 7F, page 14). The ALJ also noted Dr.
 27 Anderson ordered x-rays which showed that Plaintiff's right shoulder was normal in June 2003 (Tr. 442,
 28 Exhibit 7F, page 5). Dr. Anderson examined Plaintiff on three different dates in 2004 and 2005 for

1 "chronic shoulder pain with loss of range of motion." Pl.'s Br. at 14. However, Dr. Anderson performed
 2 no examination at the 2005 visit, which was limited to "notes written for work" (Tr. 429). The other two
 3 visits with Dr. Anderson show no inconsistency between Plaintiff's abilities and the ALJ's RFC
 4 assessment. The ALJ discussed these reports (Tr. 375, 378), and found that Plaintiff's asserted left-side
 5 limitation did not last for any ongoing 12-month period. The court notes the ALJ found Plaintiff retained
 6 greater limitations in reaching with her right upper extremity (Tr. 380). Plaintiff has failed to show any
 7 error in the ALJ's consideration of the statements or reports from Drs. Anderson or Strong.

8 Plaintiff asserts that the ALJ should have approved a request for consultative psychological and
 9 neurological testing. Pl.'s Br. at 16-18. The ALJ properly addressed and declined Plaintiff's requests
 10 because there was no evidence nor allegation of psychological impairment and the record was did not
 11 indicate the need for additional neurological testing (Tr. 379). Moreover, Plaintiff has failed to
 12 demonstrate that the evidence was so ambiguous or inadequate as to require the ALJ to purchase
 13 additional consultative examinations. Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). To the
 14 contrary, sufficient evidence existed for the ALJ to reach her decision without the need for further
 15 evaluation, including a previous neurological examination and the opinions of Plaintiff's treating
 16 physicians and primary care physicians (Tr. 379).

17 In sum, it is clear to this court that the ALJ properly considered the medical evidence and opinions
 18 of record. The ALJ decision is properly supported by substantial evidence in the record.

19 ***B. THE ALJ PROPERLY WEIGHED AND EVALUATED PLAINTIFF'S AND PLAINTIFF'S
 HUSBAND'S CREDIBILITY***

20 Bunnell v. Sullivan, 947 F.2d 341 (9th Cir. 1991) (*en banc*), is controlling Ninth Circuit authority
 21 on evaluating plaintiff's subjective complaints. Bunnell requires the ALJ findings to be properly
 22 supported by the record, and "must be sufficiently specific to allow a reviewing court to conclude the
 23 adjudicator rejected the claimant's testimony on permissible grounds and did not 'arbitrarily discredit a
 24 claimant's testimony regarding pain.'" Id. at 345-46 (quoting Elam v. Railroad Retirement Bd., 921 F.2d
 25 1210, 1215 (11th Cir. 1991)). An ALJ may reject a claimant's subjective complaints, if the claimant is
 26 able to perform household chores and other activities that involve many of the same physical tasks as a
 27 particular type of job. Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989) However, as further explained in
 28 Fair v. Bowen, *supra*, and Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996), the Social Security Act

1 does not require that claimants be utterly incapacitated to be eligible for benefits, and many home
 2 activities may not be easily transferrable to a work environment where it might be impossible to rest
 3 periodically. Similarly, the ALJ can reject the testimony of lay witnesses only if he gives reasons
 4 germane to each witness whose testimony s/he rejects. Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir.
 5 1996) Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993).

6 Here, the ALJ addressed the testimony provided by Plaintiff and her husband in detail. He wrote:

7 The allegations of the claimant are not entirely credible in light of the treatment record, her
 8 daily activities, and lack of compliance with treatment recommendations. While the
 9 claimant complains of debilitating pain, she sought very little treatment in recent years for
 her complaints.

10 The records shows a history of chiropractic treatment in the 1980's and early 1990's but
 11 none in recent years (Exhibits 1F, 2F). Records from 2001 and 2002 show treatment for
 12 bronchitis, scabies, abdominal pain, sinusitis and allergies (Exhibit 6F). She sought
 13 treatment for sudden onset of left chest wall and arm pain in January 2002 and was
 14 diagnosed with a probable sprain or strain (Exhibit 6F-11). She requested a "functional
 15 test" from her physician in May 2002 (Exhibit 6F-3). She was not seen again until almost
 16 a year later, in April 2003 when she was evaluated for left chest wall pain (Exhibit 7F-9).
 17 The claimant testified that she has had health insurance. Records reflect she has received
 18 regular treatment for other minor conditions such as sinusitis, indicative of access to health
 19 care when desired.

20 Ms. Hatcher has sought treatment more frequently since 2003. However, treatment
 21 records are not fully supportive of her allegations. In June 2003 she reported she could not
 22 stand straight due to unequal leg length which she had ignored for years while she was
 23 busy raising a family and working. She reported she now wanted to regain her function
 24 rather than continue to deteriorate. Films showed no leg length discrepancy (Exhibit 7F-
 13). There is no evidence that this issue has required any further evaluation of treatment.
 The claimant testified to headaches 3 or 4 times a week which are at a "10" on a scale of 1
 to 10. However, she uses only Tylenol and there is no evidence of these headaches in the
 treatment record. The degree of pain the claimant alleges related to her headaches is not
 credible in light of the lack of treatment other than Tylenol and absences of complaints to
 any treatment provider.

25 The claimant began physical therapy in August 2003. She initially reported improved
 26 strength and motion of the right upper extremity and decreased left clavicular pain (Exhibit
 27 7F-14, 16). However, she then had some pain and quit. She testified that her doctor
 28 ordered her to stop physical therapy but there is no evidence of this in the treatment record.
 Her physician offered an injection for her worsened symptoms but she declined (Exhibit
 7F-17). The claimant's failure to pursue recommended treatment modalities is not
 consistent with her allegations of debilitating pain.

In November 2003 she was seen because she was requiring increased consumption on Ventolin. Her physician stressed the need for her to discontinue nicotine abuse but she responded "I am just going to keep smoking doc I don't much care" (Exhibit 7F-9). In April 2005 she was seen to establish care with a new physician. She was encouraged to quit using marijuana but has not done so. The claimant's credibility is further undermined by her failure to comply with these treatment recommendations.

The claimant's allegations of debilitating pain are not entirely credible in light of her

1 activities. The claimant provided confusing and contradictory testimony. She initially
 2 testified that she never does housework but then went on to describe doing some cooking,
 3 laundry and cleaning. She testified that she cannot vacuum and then testified that she
 4 vacuums for 15 minutes on good days. She is able to drive. She testified that she cannot
 5 lift more than her 7-pound cat and indicated that she could not lift the cat up from the
 6 ground. She then testified that she is able to hold her 15 pound grandson while standing.
 7 She also reported bowling about every 6 months with an 8 pound ball. She reported
 8 bowling a whole game, 10 frames, using the ball 10 to 20 times. She testified that her arm
 9 "jumps" with muscle spasms and that this causes pain at a "10" on a scale of 1 to 10. She
 then testified that this occurs daily and lasts all day. She testified she has headaches which
 rate a "10" on a scale of 1 to 10 three or four days a week. She testified that these
 headaches last all day and night but she takes only Tylenol for the headaches. Headaches
 are not mentioned in the treatment record. The claimant's testimony would indicate she
 suffers essentially constant pain at a "10" every day. This allegation is not credible. She
 functions independently, does some house work, occasionally bowls, and occasionally
 goes fishing. She takes only 10 Vicodin per month, takes Flexeril only at night, and takes
 only Tylenol for her headaches.

10 At the initial hearing the claimant's spouse testified that her pain had become more severe.
 11 She needed help more often and took more pills. She needed help picking up heavy things
 12 around the house. She could not do repetitive work. She could walk 15 minutes and then
 13 would seize up. He reported she bowls but could not longer bowl a whole game without
 "breaking down". He indicated that the last time she bowled was 3 to 4 months prior to
 the hearing. Previously she had bowled once a month. He testified that she could not sit
 long enough to fish. He bought her a bike but she was unable to use it.

14 At the September 2005 hearing the claimant's spouse testified that her condition has
 15 worsened since the last hearing. Her back locks up. A couple weeks ago she was on the
 16 ground, screaming in pain. This was the second or third time this has happened recently.
 17 He massaged her back and gave her a muscle relaxer. After sitting an hour in a restaurant
 she could not get up to leave. For 3 days he had to help her get in the car and get out of
 bed.

18 The allegations of Mr. Hatcher are not entirely credible in light of the treatment record.
 19 He testified that she can no longer bowl a whole game but the claimant testified that she
 20 does bowl an entire game. He testified that she cannot fish but the claimant testified that
 she does fish. While her back may have "locked up" on a few occasions, there is no
 evidence that this is an ongoing problem. Her difficulties resolved with muscle relaxers
 and she did not require medical treatment on these occasions.

21 (Tr. 378-379).

22 After reviewing the ALJ's decision and the administrative record, it is clear the ALJ has provided
 23 sufficient evidence to discredit the Plaintiff's allegations of total disability. The record properly supports
 24 the ALJ's analysis of Plaintiff's treatment record, her daily activities, and lack of compliance with
 25 treatment recommendations. The record also properly supports the ALJ's analysis of the inconsistencies
 26 in the testimony of Mr. Hatcher when compared with the medical evidence relied upon by the ALJ and
 27 the statements of Plaintiff. The court notes it is the ALJ who is responsible for determining credibility,
 28 Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999), and the ALJ may make first-hand observations

1 during a hearing as a factor in assessing a claimant's credibility, Morgan v. Commissioner of SSA, 169
 2 F.3d 595, 599-600 (9th Cir. 1999). Accordingly, the ALJ did not err when he evaluated and discredited
 3 Plaintiff's and Plaintiff's husband's testimony regarding the severity of Plaintiff's limitations.

4 **C. THE ALJ PROPERLY EVALUATED PLAINTIFF'S RESIDUAL FUNCTIONAL CAPACITY**

5 If the ALJ cannot determine whether a claimant is disabled based on a claimant's current work
 6 activity or on medical facts alone, and a claimant has a severe impairment(s), a review is made of the
 7 claimant's residual functional capacity ("RFC") and the physical and mental demands of the work a
 8 claimant did in the past. 20 C.F.R. § 404.1520(e).

9 In this case, the ALJ examined the record and concluded:

10 [T]he claimant retains the residual functional capacity to lift 20 pounds occasionally and
 11 10 pounds frequently. She can stand and walk 6 hours out of an 8-hour day and sit 6 hours
 12 out of an 8-hour day. She cannot climb ladders, ropes or scaffolds. She is limited to
 13 occasional reaching with the right upper extremity. She can do no overhead reaching with
 14 the right upper extremity. Over the last 15 years she has learned to use her left upper
 15 extremity to compensate for limits in her right extremity.

16 This residual functional capacity is consistent with the treatment record and the claimant's
 17 activities. Treatment records from May 2002 who limited motor strength in the flexion
 18 around the elbow on the right side consistent with moderate biceps atrophy. Strength in
 19 the hand and distal arm was better than around the elbow but not equal to the left side.
 20 Motor strength in the legs was normal on the left and 4+ on the right. Deep tendon
 21 reflexes were normal and symmetrical in the patellar and Achilles tendons but diminished
 22 in the right biceps. Fine motor coordination was normal. Overall she exhibited deficits on
 23 the right side with some weakness and pain but no evidence of new symptoms (Exhibit 6F-
 24 3). The claimant has alleged low back pain and hip pain but there is no evidence of
 25 limitations in standing or walking. She has been diagnosed with mild thoracic scoliosis
 26 but no other condition. Her allegations of leg length discrepancy is not supported by the
 27 treatment record. The claimant's right upper extremity impairment results in limitations in
 28 lifting and reaching. However, these problems began in 1987 and she was able to work for
 many years despite this condition. There is no evidence that her problems with right-side
 weakness have worsened since she was last able to work. Her right brachial plexopathy
 and right side weakness render her unable to lift more than 20 pounds occasionally or 10
 pounds frequently. The reaching limitations described in the claimant's residual functional
 capacity are consistent with her motor strength deficits on the right and evidence of pain
 with rotation of the neck. She remains capable of occasionally bowling and fishing. She
 manages self-care activities independently and performs some household tasks. These
 activities are indicative of a capacity for occasional reaching with the right upper
 extremity. However, she is precluded from overhead reaching with the right arm. While
 the claimant experiences some pain, she remains capable of the residual functional
 capacity described above. She worked for many years despite her right side injury in
 1987. She previously indicated she was using 4 to 8 Vicodin per day but she has
 dramatically cut down the medication and is no using only 10 a month. She uses Flexeril
 only at night. She briefly engaged in physical therapy, which improved her strength, but
 she discontinued it. She reports she does not lie down during the day.

1 (Tr.380).

2 To a great extent Plaintiff's argument that the ALJ failed to properly assess her RFC is premised
 3 on the earlier arguments that the ALJ failed to properly consider the medical evidence and her testimony
 4 or credibility. As discussed above the ALJ did not err in his assessment of the medical evidence and
 5 plaintiff's limitations. The ALJ's RFC properly reflects the medical evidence which was relied upon by
 6 the ALJ. After reviewing the record, this court does not find any error in the ALJ's evaluation of
 7 Plaintiff's RFC..

8 **D. *SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDING THAT PLAINTIFF IS ABLE TO PERFORM
 9 PAST RELEVANT WORK, AND, ALTERNATIVELY, OTHER WORK IN THE NATIONAL ECONOMY***

10 Based upon vocational expert testimony, the ALJ in this case found that Plaintiff was capable of
 11 performing her past relevant work as a laundry folder as she had performed that job (Tr. 381). Plaintiff
 12 contends the ALJ erred when he relied on the expert's testimony to reach this conclusion, arguing that the
 13 VE failed to explain a variation of the DOT's job description, which arguably requires frequent reaching
 14 verses Plaintiff who was limited by the ALJ to only occasional reaching. Plaintiff's Opening Brief at 20-
 15 21.

16 The Ninth Circuit recently wrote:

17 At step four, claimants have the burden of showing that they can no longer perform
 18 their past relevant work. 20 C.F.R. §§ 404.1520(e) and 416.920(e); *Clem v. Sullivan*, 894
 19 F.2d 328, 330 (9th Cir.1990). Once they have shown this, the burden at step five shifts to
 20 the Secretary to show that, taking into account a claimant's age, education, and vocational
 21 background, she can perform any substantial gainful work in the national economy. 20
 22 C.F.R. §§ 404.1520(f) and 416.920(f). *Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir.2000).
 23 Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to
 24 make the requisite factual findings to support his conclusion. SSR 82-62. See 20 C.F.R. §§
 25 404.1571 and 416.971, 404.1574 and 416.974, 404.1565 and 416.965. [Footnote omitted]

26 This is done by looking at the "residual functional capacity and the physical and
 27 mental demands" of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(e) and
 28 416.920(e) The claimant must be able to perform:

- 29 1. The actual functional demands and job duties of a particular past relevant job; or
- 30 2. The functional demands and job duties of the occupation as generally required
 31 by employers throughout the national economy. SSR 82-61. This requires specific findings
 32 as to the claimant's residual functional capacity, the physical and mental demands of the
 33 past relevant work, and the relation of the residual functional capacity to the past work.
 34 SSR 82- 62.

35 Pinto v. Massanari, 249 F.3d 840, 844-845 (9th Cir. 2001). At step-five the burden of proof shifts to the
 36 Commissioner to produce evidence of other jobs existing in significant numbers in the national economy
 37 that Plaintiff could perform in light of his age, education, work experience, and residual functional

1 capacity. *See Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999); *Roberts v. Shalala*, 66 F.3d 179, 184
 2 (9th Cir. 1995). In *Tackett*, the court noted “there are two ways for the Commissioner to meet the burden
 3 of showing that there is other work in ‘significant numbers’ in the national economy that claimant can
 4 perform: (a) by the testimony of a vocational expert, or (b) by reference to the Medical-Vocational
 5 Guidelines at 20 C.F.R. Pt. 404, subpt. P, app. 2.” *Id.*

6 Plaintiff’s allegation that the ALJ erred when he relied on the Vocational Expert’s testimony to
 7 conclude Plaintiff was able to return to past relevant work is without merit. The ALJ’s hypothetical to
 8 the vocational expert clearly reflected a properly supported RFC, and the VE made it perfectly clear that
 9 his testimony was being limited to a person who could only occasionally reach (Tr. 496, 499-501).
 10 Similarly, the undersigned finds no error in the ALJ’s step-five finding that Plaintiff, given her RFC, is
 11 capable of working as a small products assembler, solderer, or a video rental clerk.

12 **CONCLUSION**

13 Based on the foregoing discussion, the Court should affirm the Administration’s final decision
 14 denying plaintiff’s application for social security disability benefits. Pursuant to 28 U.S.C. § 636(b)(1)
 15 and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service
 16 of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a
 17 waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating
 18 the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on
 19 **September 7, 2007**, as noted in the caption.

20 DATED this 15th day of August, 2007.

21 /s/ J. Kelley Arnold
 22 J. Kelley Arnold
 23 U.S. Magistrate Judge
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